

Conceptualising ‘style’ in legal scholarship: the curious case of Zweigert’s ‘style doctrine’

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This paper focuses on the German legal scholar Konrad Zweigert’s (1911–96) deceptively simple and notoriously vague use of the term “style” in comparative legal scholarship. In particular, it discusses Zweigert’s use of “style” as a basis for the classification of legal families (Zweigert 1961); a classification which has become widely known through his textbook, co-authored with Hein Kötz (Zweigert – Kötz 1971/1996) and globally popularised through its English translation (Zweigert – Kötz 1998).¹ Starting with a (relatively) close reading of Zweigert’s 1961 essay and some other writings (section 1), followed by an overview of some of the main criticisms of his “style doctrine” (section 2), the paper argues that Zweigert’s use of style reveals a latent tension between a culturalist and a functionalist approach in his theorising (sections 3 and 4). This tension could be kept under control (and under the radar) by reducing the ambitions of both theoretical aspirations. In other words, while Zweigert has not built either a thorough cultural or a thorough functional theory of comparative law, as the concluding section 5 suggests, both routes, and even the possibility of a genuine stylistic analysis of law are open. Thus, the paper can be seen as a case study in another sense too, concerning some persistent methodological problems and tensions in comparative legal research.

1. “Stil-Doktrin”: a “pretty idea”?

Inspired primarily by art history and literary studies, in his 1961 essay „Zur Lehre von den Rechtskreisen” (Towards a doctrine of legal families, Zweigert 1961), Zweigert introduced what he later (Zweigert 1977, 175) called his “style doctrine”. Zweigert’s essay, published in a multi-language *Festschrift* for the American legal scholar Hessel Yntema, was meant to provide a theoretical framework for classifying legal systems into legal families (*Rechtskreise*) based on their “style”. It is noteworthy that the essay is in essence reproduced in the textbook (Zweigert – Kötz 1998, 63-75) with minor changes and a few later additions, as a section of the early methodological part of the book.

Zweigert’s immediate goal was taxonomic: to use distinctive stylistic traits as a basis for putting legal systems into groups and thus make the task of comparison tractable. Zweigert uses “style” as a cluster concept grouping an eclectic mix of features characteristic of the history, language, techniques, doctrines and values of national laws. He refers to five factors that together, in his judgement, constitute their style: the (1) historical origin, (2) specific mode of legal thought, (3) particularly distinctive legal institutions, (4) the legal sources and

¹ Unless there is a reason to do otherwise, I shall refer to the 1998 English translation of the third edition of the textbook, translated by Tony Weir. The importance of this translation in providing the book an “authoritatively dominant position within the field” of comparative law (Legrand 1995, 634) cannot be overestimated. „In conversation on a New Orleans streetcar in early November 2000, Kötz voiced this rhetorical question: “Where would I be today without Tony Weir?”” (Legrand 2005, 633 fn 5)

their interpretation, and (5) ideological factors (Zweigert 1961, 48, see also Zweigert – Kötz 1998, 69).

Zweigert's basic claim is that the style of a legal system is a composite of heterogeneous elements. If we want to explicate the concept of style used in this essay, it would roughly refer to those features (*stilprägende Elemente*) which are (not each individually necessary but) jointly sufficient to identify characteristic differences between complex mental or social constructs such as legal systems and their groups.

The main contribution of this approach to comparative law debates seems to be that Zweigert, like René David (1950) a few years earlier, emphasized a plurality of defining characteristics rather than defining legal families by just one factor as it happened in earlier literature. That seems an important (though not unproblematic) contribution, regardless of whether it is called 'style' or something else. Indeed, as Zweigert emphasised at the end of his analysis both in the essay (1961, 55) and the textbook, his aim was not "to offer a new grouping of legal systems but rather to use the concept of style in the context of law to elucidate better than has hitherto been done the criteria which should be employed in grouping the legal systems together and deciding which group a particular system belongs to." (Zweigert – Kötz 1998, 75) The classification builds on the one suggested by Arminjon, Nolde and Wolff (1950, 42-53) and distinguishes eight legal families: Romanistic, German, Nordic, Anglo-Saxon, Communist, Far-Eastern (non-Communist), Islamic, Hindu.

Here, however, our concern is more closely with Zweigert's conceptual and terminological choice in grouping this plurality of criteria under the label 'style'. This choice matters because Zweigert's broader ambition was thoroughly and undeniably theoretical: to provide system and method for comparative law, both as an academic discipline and a university subject – all this in the post-war Western German legal and political context.

This ambition was strongly expressed in some of his earlier writings (Zweigert 1950, 1952, Aubin-Zweigert 1952). In those pieces he used the term "style" frequently although not always in the same or similar sense as in 1961 (Zweigert 1950, 355, 357; 1952, 400, 403, 404, 405). He also referred to the same ideas by other terms such as "milieu" (inspired by René David; Zweigert 1952, 403) or "structure of thinking" (*Denkstruktur*, translating Roscoe Pound's „mental habits governing judicial and juristic craftsmanship", Zweigert 1952, 404). Yet, the term "style" appeared already in a book review he wrote in 1950 suggesting that the classification of legal systems into families only makes sense "if we explore, based on their historical background, the essential differences between the legal *style* of Romanistic, Germanic, Anglo-American, Slavic, Asian and religious laws." (Zweigert 1950, 355, my emphasis) Note that the legal families identified here are different from those suggested in 1961.

In introducing his style doctrine, Zweigert's explicit sources include art history (Goethe, Wölffin), social psychology (Wundt), economics (Spiethoff) and canon law. In this section, I shall briefly analyse his use of this heterogeneous list of sources, in order to see how they throw light on what Zweigert means by style. As I shall argue, these sources provided associative inspiration rather than a methodological basis for his theoretical move. Zweigert's rather superficial use of these sources demonstrates that he has chosen an interesting and

promising new label for the old taxonomic exercise in comparative law but his reliance on contemporary discussions on style in cultural studies was not sufficient to reap the full benefits of this terminological choice. I shall come back to this point in the following sections.

Zweigert justified the borrowing of the term in 1961 thus:

“The concept of style which had served as a distinguishing criterion in the literary field and the fine arts has long been used in other fields. Style in the arts signifies the distinctive element [*Eigenheit*] of a work or its unity of form but many other disciplines use this fertile concept to indicate a congeries of particular features [*ganze Inbegriffe von Eigenheiten*] which the most diverse objects of study may possess.” (Zweigert 1961, 46, translation in Zweigert – Kötz 1998, 68 slightly modified)

To elaborate, he mentions a number of examples from various disciplines. First, he refers to a short theoretical article by Goethe (1788), already quoted in the epigraph, which identifies style, in contrast to imitation of nature and manner [*Manier*] as the highest form of art.² Goethe’s article uses style as a term of praise which one should employ when the artist grasps the essence of the represented object. Although in the 1961 essay Zweigert used the term descriptively, some of his earlier remarks suggest that occasionally he also used the term in an evaluative sense, as a term of appreciation, e.g. when speaking of someone achieving “the profundity of a stylistic comparison” (Zweigert 1950, 357).

Second, Zweigert (1961, 46, n 3) refers to the classic study of the art historian Heinrich Wölfflin (1947/1915), to legal historian Franz Wieacker (1953, 5)³ and to a particular passage in volume 9 of Wilhelm Wundt’s monumental social psychology (Wundt 1918, 455–6).⁴ The two latter references stand as loose inspirations for the idea that the “spirit” of historical legal systems is best grasped through their characteristic institutions (the third element of style).

Zweigert’s next reference is to canon 20 of the 1917 *Corpus Iuris Canonici* (Code of Canon Law) where *stilus curiae*, i.e. unwritten practices of the Papal court are mentioned as a tool of interpretation (Strätz 1986, 55–7). But this reference does not go into any detail of the origins and significance of this legal concept. Zweigert merely points at the terminology without analysing the doctrinal concept or analogising it to his use of style.⁵

Finally, he briefly discusses the use of “economic style” by the German economist Arthur Spiethoff (1933, 56) as a summary term for those features that determine economic life of

² Goethe uses these three concepts to distinguish three ways of mimicking nature as three conceptions of art. Depending on the object represented and the character of the artist, all three conceptions are valid, as long as there is harmony between the object and the character. For a modern interpretation of Goethe’s theory, and especially his use of “style” as a term of praise, see Forssman 2005, 55.

³ Note that in another classic work, undoubtedly known to Zweigert, legal historian Wieacker discussed Triepel and Kantorowicz and their use of the term „style” and explained his terminological choice against it (Wieacker 1952, 10. fn 2). Zweigert did not refer to either Triepel or Kantorowicz.

⁴ This reference is somewhat ambiguous as Zweigert does not make clear if he agrees with Wundt’s claims on the difficulties of identifying common elements across legal systems.

⁵ In the new CIC which came into force in 1983, the canon on judicial custom as a method of interpretation was rephrased, dropping the term “stilus”. In the second and third editions of the textbook, published after 1983, Zweigert and Kötz did not update this reference. Perhaps they did not know much about the historical importance of the term for a legal understanding of style or simply did not consider the issue.

any given society,⁶ only to conclude that the particular features identified by Spiethoff are “obviously” not relevant for him, as he is after “those features that jointly determine the style of entire groups of legal systems.” (Zweigert 1961, 47)

Referring to this variety of sources and to the heterogeneity of the elements of style, some critics call his approach eclectic (Eörsi 1979, 33). But, arguably, there is no problem with eclecticism as such. As Zweigert’s predecessor and hero Ernst Rabel famously said, (comparative) lawyers should be interested in all the connections, affinities, etc. of law with other domains of nature and culture, from geography (“land, climate, and race”, Rabel 1919/1967, 5) to politics to theology (Kötz 1982, 574–5). To be sure, this can lead to fruitful insights as well as dubious speculations. The question is whether these connections can be accounted for theoretically. The next section will discuss, through an example how Zweigert engages with historical and empirical matters, occasionally going beyond a mere taxonomy.

2. Taxonomy or theory?

Overall, Zweigert’s use of inspirations in theorising comparative law shows a lack of philosophical rigour and is thin on historical and empirical analysis. This becomes problematic when the author goes beyond taxonomy and ventures to suggest (causal) explanations for stylistic features of laws.

The most striking and best known example is when Zweigert speculates about the possible effect of closeness to sea on English mentality, arguing, in particular, that this geography resulted in an empiricist outlook and a supposedly typical English preference for case law over legislation in law-making (Zweigert 1961, 50).⁷ This example, an astonishing combination of *Geistesgeschichte*, naïve social psychology and geographical/climatic determinism, has been criticised and caricatured by the Hungarian comparative legal scholar Gyula Eörsi:

“The English way of thinking can hardly be traced back, even by assumption, to the uncertainties of seamen’s life [...]: when life was uncertain at sea, prospects of life insurance were not very propitious on the European continent either; and it would be difficult to say where commercial risk was greater. *Brecht’s Mother Courage* was rooming about at the time of the Thirty-Years War, and she was not a seaman; the English are not the only seafaring nation and in other countries lack of safety of life led not to empiricism but to irrationalism; besides, English masses in their entirety were not seafarers. Furthermore, empiricism fails to explain that pre-capitalist institutions and legal methods have survived up to these days in England.” (Eörsi 1979, 45)

Note that Eörsi’s critique is both substantive and methodological. Reading his entire criticism of Zweigert (ibid, 42–6), as well as his own proposal for classifying legal systems (Eörsi 1973),

⁶ On the academic context of Spiethoff’s paper in German economics see Redlich 1970, on modern uses of economic style in (comparative) economics see Schefold 1994, Schefold 1994–95.

⁷ The corresponding passage in the textbook, in Weir’s translation goes: “The Englishman improvises, never making a decision until he has to. As Maitland said, he is an empiricist. Only [lived] experience counts for him; [a priori] theorizing has little appeal; and so he is not given to abstract rules of law. Convinced, perhaps from living by the sea, that life will controvert the best-laid plans, the Englishman is content with case-law as opposed to enactments.” (Zweigert – Kötz 1998, 71)

one cannot fail to see both the brilliant insights and the “Marxist” straightjacket he forced upon himself.⁸ More interesting for our purposes is to notice that Eörsi himself cannot withhold the speculative generalisation of calling Zweigert’s theory the typical product of a German inclination for systematisation as well as irrationalism (Eörsi 1979, 33). Note also the ironic stylistic similarity in using a literary figure (Mother Courage) as a stand-in for a serious argument in social and economic history.

Even more ironically, perhaps, Pierre Legrand, in an otherwise extremely critical postmodern essay on (Zweigert and) Kötz’s methods,⁹ patted them on the shoulder for what he considers their going beyond black-letter law and providing “contextual analysis”: „To be fair to Hein Kötz, I must acknowledge that “context” occasionally features in his book as where he suggests a connection between the English legal community’s predilection for judicial over legislative law-making with the fact that English lawyers “liv[e] by the sea”.” (Legrand 2005, 662 fn 164)¹⁰ It is hard to judge how seriously this acknowledgement should be taken.

The crude analysis of English national character explaining features of English law is not Zweigert’s alone. In an eminently readable short book on “the spirit of English law”, Gustav Radbruch (1947, 11) made similar off-hand remarks, e.g. on the general high level of social trust reflected in the fact that train passengers leave their luggage unlabelled in a designated carriage and pick it up themselves on arrival. Zweigert’s essay did not refer to Radbruch’s book even though there are some affinities between the two discussions of English national character and law.¹¹

This is also not the only example of causal just-so-stories. In both the essay and the textbook, Zweigert provides similar speculative insights on “the wisdom of the East”, and the rise and fall or, as it were, the cultural lifecycle of formalism (Zweigert 1961, 50–1; Zweigert – Kötz 1998, 71–2).

⁸ For his own classification of legal systems into “types” and “groups” see Eörsi 1973; 1979. See also Kötz 1982.

⁹ It is worth noting that throughout this critical article, Legrand mistakenly attributes the methodological and substantive statements in the first chapters of the textbook to Kötz only. In fact, as mentioned above, they originate from Zweigert only, sometimes directly from his previous single-authored writings (Drobnig 2007, 93–4). Kötz (2009) himself is explicit in identifying Zweigert’s 1961 essay as the origin of the style doctrine. Legrand is also mistaken in accusing Kötz of never responding to criticisms (Legrand 2005, 634–5), see Kötz 1998/2005, 94–5, 99. These responses were originally published in 1998, so available to Legrand. On Legrand’s “crude simplifications” and “funny insinuations” see also Flohr (2017, 17–9), and more generally, the 2017 special issue of *American Journal of Comparative Law*, especially Whitman (2017).

¹⁰ Legrand (2005, 661–2) characterises the contextual knowledge he misses thus: “I have in mind knowledge that moves away from authorized or naturalized data, from a technical rationality that is too impoverished and restrictive to treat law in any other terms than context-free clusters of data. [...] I have in mind knowledge that situates posited law in interdiscursive and intertextual terms, that is, locates it in relation to all other aspects of the law’s lifeworld—the basic idea being to unconceal what is latent within the law such that law be optimally present in the fullness of its current meaning in a given situation.”

¹¹ Flohr (2017, 107) suggests that this “empathic portrait” of the Englishman was inspired by Radbruch (1947). Legal scholars have engaged more thoroughly with the question whether there is any causal link between English national character and features of English law and suggest a negative or sceptical answer, in other words, recognise a relative autonomy of legal thought which, in turn, can be more narrowly contextualised within the professional mentality of English lawyers (Flohr 2017, 101–18).

Overall, the question arises, how seriously should we take Zweigert's "*Stil-Doktrin*" as a theoretical contribution? Is it perhaps nothing more than a "*hübscher Einfall*", a caprice or pretty idea, as later suggested by Kötz (1998/2005, 91)?¹²

In a sense, this is the main question raised by Leontin-Jean Constantinesco's more thorough than elegant or charitable critique of the style doctrine. To appreciate the reasons for unfriendly tone, it is worth noting that this critique was written in response to Zweigert's earlier complaint (Zweigert 1977, 175) that Constantinesco failed to consider the style doctrine in (the first two volumes of) his own comparative law treatise.¹³ In due course, Constantinesco first devoted a journal article to Zweigert's theory of style (Constantinesco 1979) which he later adapted as a chapter in the third volume of both the German (Constantinesco 1983a) and the French version (Constantinesco 1983b) of his treatise. While Constantinesco raises many critical points against Zweigert's theory, it is instructive to summarise his comments on the five style-marking elements, mentioned above, one by one.

As for the first element, historical evolution, he has this to say: „It is important to distinguish a historical and a structural analysis of a legal system. In taking the historical evolution as one among the characteristics of a legal system, Zweigert confuses things. When he says that the style of a legal order is expressed in its historical evolution, this is incorrect. Actually, it is rather explained by historical evolution. To know the history of a legal system is not to know its structure, it is merely to know how it came about.” (Constantinesco 1983b, 128) In other words, by including historical origin among the criteria of style, Zweigert mixes these two perspectives, historical and structural, as well as confounds cause and effect (ibid, 128–9). This sounds like a plausible objection – one wonder why Zweigert was not more attentive to this point. Perhaps because he is only interested in the classificatory exercise, as it were, pragmatically.

As for the second element, differences in ways of legal thinking, Constantinesco acknowledges its value, noting that it is in line with previous research. He adds, rightly, that recently there have been emerging new differences between legal families which are more important than the one between civil and common law. Zweigert can readily acknowledge this.

Regarding the third element, characteristic legal institutions, Constantinesco (1983b, 130) perceptively notes that this is based on the premise that differences lie in substantive law. He calls this an axiom and claims it to be false, arguing that the links within a legal family do not depend on substantive law. He also claims that Zweigert's examples themselves prove that these institutions cannot form the basis of style (ibid). He analyses one or two examples in some detail, suggesting altogether that these institutions are not a good basis or criterion for

¹² Note that this question is different from the usefulness of the classification or taxonomy of legal systems itself. This latter question does not concern us directly here. As mentioned above (n 11), Kötz (1998/2005) discusses some objections to their, i.e. mainly Zweigert's, methodology of classifying legal systems. He is not only relaxed and ironic about Zweigert's references to art history and literary studies. His comments on legal families are similar in tone. While arguing for the usefulness and the overall soundness of their categorisation, he is willing to relegate the entire exercise of taxonomy to pedagogy, calling it a didactic tool for beginners, or, in his florid language, to worship legal families at a side altar in the temple of comparative law.

¹³ It is probable that the unfriendly tone emerges from a broader sense in which Constantinesco held personal grudges against the Hamburg Max Planck Institute in general and Zweigert in particular.

classification. Then he makes a curious argument (ibid, 132): if some of the original institutions in common law, such as consideration or “various degrees of property” were abolished and replaced by their functionally equivalent counterparts, the English legal system would still maintain its specific structure. After all, these elements, although original, are fungible and not determinative. Elsewhere, he claims that the three Continental legal families distinguished by Zweigert: Romanistic, German and Scandinavian, cannot be considered separate families because their differences are only secondary (ibid 129).

These arguments about primary/secondary and determinative/fungible features of legal systems rely on Constantinesco’s own theoretical framework. By taking the adequacy of his own theory for granted, Constantinesco does not genuinely engage with Zweigert on his own terms or on any common ground. While he certainly suggests criteria for distinguishing primary/secondary and determinative/fungible features, he argues as if the divergence between their respective classificatory schemes were in itself a valid basis for criticism. To defend this position, Constantinesco could argue that Zweigert’s style doctrine is so thin on theory that he has no other way to engage with it than by using his own framework.

Interestingly, however, Constantinesco also employs a standard functionalist argument, viz. that the same institution or doctrine can have different functions in different systems (ibid 130). This is an uncontroversial point. Yet, the soundness of his further argument based on this one i.e. that as soon as we find something similar in another system, the institution cannot be characteristic for the system, depends on how we describe that particular institution or doctrine, formally or functionally. Thus, in essence, the soundness of this criterion will depend on how, i.e. through what kind of criteria these institutions are identified – at this stage Zweigert is silent on this matter.

A potentially more serious, internal objection to Zweigert’s classificatory exercise is that it only names characteristic institutions in four of the eight suggested legal families and none for the others. This is problematic if the style doctrine is based on five individually necessary elements of style. Read carefully, however, one can notice that Zweigert (1961, 54) pre-empted this criticism, arguing that the relative importance or distinguishing power of these criteria differs from family to family. The distinguishing features of a legal family need not be institutional but may lie elsewhere.

As for the fourth and fifth criteria, legal sources and methods of interpretation, and ideology, respectively, Constantinesco agrees with Zweigert on their importance but finds Zweigert’s discussion of these features “banal, superficial and insignificant” (Constantinesco 1983b, 134) and refers back to René David.

Overall, the main significance of Constantinesco’s negative assessment of the style doctrine is that in an unfriendly and uncharitable tone they hint at valid critical points. Ultimately, what he might have expected and then missed was a serious engagement in historico-cultural analysis of legal families. Can we detect any such aspiration in Zweigert? Could his style doctrine be seen as a starting point for such analysis?

3. A stylistic analysis in comparative law?

Arguably, Zweigert's style doctrine contains the germs of a culturalist or expressivist approach, as proposed by later theorists, including Constantinesco, Ewald,¹⁴ Legrand,¹⁵ Schlag¹⁶ and others. Reading his 1961 essay alone, Zweigert's theory is not necessarily confined to pragmatic uses. Scattered through the essay, we find some hints to what more could (have) come. For instance, he refers to the youthfulness of the discipline of comparative law as a reason for insufficient knowledge (Zweigert 1961, 53; 1972, 466), perhaps implying that with more empirical data, a more serious, i.e. less speculative stylistic analysis would be possible at a later stage.

As Zweigert locates legal scholarship (including comparative law) either among social sciences (*Sozialwissenschaften*) or humanities (*Geisteswissenschaften*) (Zweigert 1949/50, 357; Zweigert 1952, 403; Aubin – Zweigert 1952; Zweigert 1961, 47; Zweigert – Kötz 1998, ch 1), his references to these other disciplines are not surprising. Yet on closer look, his interdisciplinary references are scarce and do not reveal high theoretical ambitions. Had Zweigert aimed at a thorough stylistic analysis of national legal cultures, he could have relied on concepts, ideas and theories grounded in *Geisteswissenschaften*, the philosophy and sociology of arts, culture, symbolic forms; on authors such as Dilthey, Cassirer or Mannheim, or even more closely to the discipline of law, Radbruch or Kantorowicz – to name just a few relevant theorists from the first half of the 20th century who should have been within reach for Zweigert. This is, after all, what Heinrich Triepel did in his *Vom Stil des Rechts*, a groundbreaking although somewhat flawed cultural theory of law built around the concept of style (Triepel 1947/2007).¹⁷

The theoretical tools which Triepel had at his disposal could also have provided grounding for Zweigert's intuitive and free-floating claims about the rise and decline of formalism or the empirical attitude of Englishmen, supposedly reflected in their laws. For the theory to deliver any taxonomic work, the stylistic elements have to play a systematic role in characterising legal families. Perhaps the most important and convincing criticism of Zweigert's essay is that the result of the classificatory exercise, i.e. the eight families, do not follow from the style doctrine. Constantinesco (1983b, 135) expressed this by saying that Zweigert's style doctrine is „floating in the air.“ Rather than providing a basis for, it merely puts a new label on Arminjon, Nolde and Wolff's pre-existing classification. As indicated above, Constantinesco arguably had the false expectation that the doctrine of style would provide a methodology and a solid basis on which to build an entire theory of comparative law. This is certainly not what Zweigert's

¹⁴ „We must, it seems, for this purpose conceive of law as a cognitive phenomenon, seeing in it not just a set of rules or a mechanism for the resolution of disputes, but a style of thought, a deliberate attempt, by people in their waking hours, to interpret and organize the social world: not an abstract structure, but a conscious, ratiocinative activity.“ (Ewald 1995, 1940)

¹⁵ „What is required in an age of globalization is not so much yet more technical knowledge about what a foreign law says on any given point at any given time, for one can relatively easily consult an encyclopedia or enlist the help of a foreign lawyer to ascertain such rudimentary data. Rather, there is an urgent need to understand how foreign legal communities think about the law, why they think about the law as they do, why they would find it difficult to think about the law in any other way, and how their thought differs from ours. It is this kind of fundamental information about alterity-in-the-law that comparatists are uniquely suited to provide and that they should be seeking to disseminate, leaving the technical updates to practitioners specializing in a given foreign law.“ (Legrand 2005, 707).

¹⁶ See Schlag 2002 for a stylistic analysis of American law.

¹⁷ The innovativeness as well as the flaws of this book are discussed in the introduction to the 2007 reprint of the book by von Arnould and Durner (2007). See also Gassner 1999, 504–17.

essay was offering. However, to be taken seriously even as a classification exercise, the style doctrine has to provide some epistemic benefit.

In this respect, Zweigert can elegantly and correctly refer to the non-essentialist character of his, or indeed any, taxonomy of legal systems: they have value relative to the aims of the researcher. It is hard to dispute that whether any aspect of a legal system is relevant depends on the goals of a particular comparative exercise (Kötz 2005, 92). Whatever later interpreters have made of it, he insists that any such categorisation is time-bound and substance-bound (Zweigert 1961, 44–5). To take some trivial examples: legal families in 2019 are different from those in 1919 simply because some legal systems ceased to exist while new ones emerged; constitutional law or criminal law would suggest different classifications than private law. Furthermore, a reference to the importance of the researcher's intuition and judgement in identifying what is "important" or "characteristic" suggests that different theories can be equally legitimate (Zweigert 1961, 47).

While these considerations are sound and justify Zweigert's epistemic modesty, the resulting classification both in the essay and the textbook can easily appear as universal, rather than time-bound, linked to particular epistemic interests, and based on institutions of private law. Authorial disclaimers notwithstanding, they could easily be reified and used in misguided ways, as we will see below with regard to the "legal origins" literature.

One important methodological insights of the 1961 essay, merely hinted at rather than systematically explored, is that sometimes foreigners recognise the "important" or "typical" features of a legal system easier than insiders. In Zweigert's characteristic terms: "an index of the "importance" of a feature is when the level of surprise in the mercury-in-glass of the researcher, coming from *another* legal system, rises to a high level. That is why it is easier to recognise stylistic elements in foreign legal systems than in one's own." (Zweigert 1961, 47) Similar insights on the importance of surprise and the benefits of being an outsider in comparative work have been expressed in many disciplines in much more detail. A recent example is provided by historian Benedict Anderson (2016). Anderson's reflections on the "methodological status" of comparison are also noteworthy as they seem to be in line with, indeed make explicit, the ideas behind Zweigert's writing "style": „comparison is not a method or even an academic technique; rather, it is a discursive strategy." (Anderson 2016, 15)¹⁸

¹⁸ Here is the full quotation: „It is important to recognise that comparison is not a method or even an academic technique; rather, it is a discursive strategy. There are a few important points to bear in mind when one wants to make a comparison. First of all, one has to decide, in any given work, whether one is mainly after similarities or differences. It is very difficult, for example, to say, let alone prove, that Japan and China or Korea are basically similar or basically different. Either case could be made, depending on one's angle of vision, one's framework, and the conclusions towards which one intends to move. [...] A second point is that, within the limits of plausible argument, the most instructive comparisons (whether of difference or similarity) are those that surprise. [...] A third reflection is that longitudinal comparisons of the same country over a long stretch of time are at least as important as cross-national comparisons. [...] A fourth point is that it is good to think about one's own circumstances, class position, gender, level and type of education, age, mother language etc. when doing comparisons. [...] [G]ood comparisons often come from the experience of strangeness and absences." (Anderson 2016, 15-8)

Having identified the eclectic and somewhat obscure interdisciplinary references and the rudimentary empirical and methodological claims in Zweigert's style doctrine, should we take them seriously or rather see them as signals of Zweigert's individual or professional writing style as a mid-20th century German law professor?¹⁹

Certainly, Zweigert refrained from any systematic genealogical or functional analysis of legal families. While he did not subscribe to any crude or subtle form of "materialism", he at least flirted with *Geistesgeschichte*. Ultimately, he kept focus on law rather than its context, trusted *common sense* and relied on his cosmopolitan literary gentleman-like education, along with the thorough knowledge of a small set of national laws. Zweigert's "style" of pursuing comparative law scholarship, with its vague and superficial inspiration from non-legal disciplines but without thorough philosophical or empirical analysis, is representative of an orthodox, perhaps even old-style (comparative) legal scholarship. As such, it has both attractive features and some drawbacks.

Instead of recurring to the conceptual heavy artillery which would have been necessary to justify his references to "style" through philosophical, historical and sociological analysis and explain the characteristics of legal systems in terms of mentality or *Denkstil*, Zweigert was primarily interested in providing a taxonomy that was useful in mainly positivist practical comparative research design or legal education. In other words, the references to aesthetics, art history and other humanities should be rather seen as signals of an „old style“ approach legal scholarship where seemingly effortless and superficial aperçus and literary inspirations lead to insights. Ultimately, it seems implausible to argue that it was among Zweigert's academic ambitions to provide a systematic stylistic analysis of law, similar to Triepel's (or Ewald's or Legrand's or Schlag's). As far as his scholarship can be seen as an early example of informal interdisciplinarity, it displays some of the arguably attractive features of this writing manner, identified by Alexandra Mercescu (2019). But these are best seen as unfulfilled promises.

Thus, as far as the import of the style doctrine is concerned, it seems that Zweigert did not mean to use "style" as an analytical tool of comparison. Rather, "style" serves as a heuristic category to summarise a heterogeneous set of criteria that support a particular classification which itself is a tool of limited epistemic value. When, later in their book Zweigert and Kötz came to characterise the 8 legal families in more detail and analyse certain substantive institutions and doctrines of private law, they did not rely on the substance of the style-based classification. In fact, they followed a (weak version of the) functionalist method.

4. Style and function

Zweigert's weak commitment to a humanistic and culturalist approach to comparative law remained mostly implicit. In contrast, his adoption of a blunt version of functionalism,

¹⁹ See e.g. Zweigert 1950, 355 where after a formal excuse he uses a quote from Rilke as an argument. Note also that Hessel Yntema, the recipient of the 1961 *Festschrift*, looked at law as an embodiment of humanistic ideals, see e.g. Yntema 1956. Zweigert's „literary“ Goethe epigraph may have been chosen to resonate with Yntema's views.

advocacy of the heuristic rule of thumb *praesumptio similitudinis* and some claims for substantive convergence were explicit and received much attention in later commentary.

He identified functionalism as *the* comparative method. As he summarised in a 1972 lecture, “The basic principle of comparative law methods is that of functional equivalence; and all other methodical rules [...] derive from this principle. [...] [I]n law, the comparable is only that which fulfils the same task, the same function. That might appear to be self-evident except that it comprehends a wealth of experience in the field of comparative law, the full implications of which the beginner will not at once grasp. The one fundamental experience which goes to the very roots of comparative law is that every society poses the same problems to be solved by its law but the different legal orders solve these problems by very different means, although in the end and for practical purposes the solutions are about equal. The starting question of every comparative analysis should therefore be put in purely functional terms, the subject of analysis should be formulated without reference to the concepts of one's own legal order.” (Zweigert 1972, 466–7)

As for the presumption of similarity, he argued that “different legal systems find equal or at least astonishingly similar solutions—often down to the details—for similar problems, in spite of all differences in historical development, systematic and theoretical concepts and style of practice. [...] this presumption of similarity does not apply in every area of law. It is inapplicable to those areas which have been strongly formed by the particular political or moral values of a specific society. For all other areas, however, which are relatively value-neutral, relatively technical, the presumption of similarity of the practical solution would seem a practicable working hypothesis.” (ibid, 469–70)

Do these programmatic statements rest on a theoretically well-founded functionalist methodology? And more importantly for our present purposes, are they compatible with his style doctrine? If we want to be more precise in characterising the sort of functionalism we attribute to Zweigert, recent methodological scholarship proves to be helpful. As Michaels (2006), Husa (2013) and Valcke and Grellette (2014) convincingly argued, the claims associated with “functionalism” in mainstream comparative law scholarship, like Zweigert’s, do not typically amount to functional analysis in “a technical and operational sense” (Husa 2013, 17), e.g. as it is practiced in certain types of economic analysis or in Donald Black’s sociology of law (Black 1976/2010). Rather, functionalism in mainstream comparative law is a “methodological metaphor” which serves as a heuristic or rule of thumb, reminding comparative legal scholars of the system-relativity of doctrinal categories and directing their attention to cross-systemic functional equivalence or similarities of rules and doctrines: “this would mean taking epistemic distance from one’s own legal-cultural preconceptions” (ibid, 17.) Such a modest epistemic “function” of functionalism is entirely in line with Zweigert’s general approach to comparative law. In contrast, “even in its crude form functionalism makes no sense to the genuine relativist or die-hard post-modernist” (Husa 2013, 18).

In other words, the apparent tension between the culturalist and functionalist tendencies in Zweigert’s theory may be just that, apparent but not real. Alternatively, they may morph into a different kind of opposition or conflict which has been haunting comparative lawyers in the last two or three decades. Once again, we should beware of projecting false expectations and ambitions on Zweigert. While in his published work the tension between various epistemic

and methodological stances is mostly latent, in the last decades his classification of legal systems into families has generated important theoretical debates in comparative legal studies. In the 1990s, Zweigert and Kötz's mainstream or "orthodox" (Legrand 2005) comparative law, as popularised worldwide in their textbook, more or less simultaneously (1) came under attack by a diverse group of culturalist, critical and postmodern theorists who take a broadly culturalist or "expressivist" rather than "functionalist" stance and occasionally also recur to the terminology of "style"; and (2) was picked up by adherents of the "legal origins" or "law and finance" school (La Porta – Lopez-de-Silanes – Shleifer 2008; see also Faure – Smits 2011) to provide a starting point for quantitative comparative analysis.

Curiously, what this new wave of quantitative comparative law scholarship has done was to take Zweigert's taxonomy too seriously. Adopting, uncritically and superficially, the idea of legal families as a starting point of empirical research, these researchers have analysed, at various levels of abstraction, the performance of legal systems (and their "families"), in light of certain macro-level functional desiderata such as economic growth. It's noteworthy that despite superficial similarities, this line of research has not pursued Zweigert's functionalist programme at the level of particular institutions and doctrines. In fact, a thoroughgoing functionalism clashes with the assumptions of the legal origins literature. At least this is how two commentators on comparative property law and economics contrast these two approaches:

"How different are civil and common law property? Traditional comparative law sees them as quite divergent—the one as an outgrowth of Roman law and the other as retaining a feudal character. On this view, civil law is all about dominion and ownership, and the common law does hardly more than protect the possessory relationship (with the common law perhaps lacking a notion of ownership at all). The traditional view has received a boost from the so-called 'legal origins' literature, which purports to find a positive correlation between a common law origin of countries' legal systems and their positive macro-economic performance (see, e.g., La Porta et. al. 2008). At the same time, an almost diametrically opposed picture of the relation of civil and common law has also held sway, especially in law and economics and other functionalist quarters. To this way of thinking, civil law and common law both provide a similar bundle of rights and duties, with variation around the edges. Functional ownership is present in both systems, furnishing broad control rights and a residual claim, with more or less extensive regulation of uses. The different vocabulary or even the (on this view) minor doctrinal differences between civil and common law property systems are not likely to matter enough to produce the macro effects that are the focus of the legal origins literature." (Chang – Smith 2016, 131)

Thus, Zweigert's style doctrine has to be made sense of in a more diverse and sophisticated intellectual landscape of comparative law theory than even 30 or 40 years ago when Eörsi and Constantinesco took it on. In the 21st century, on the one hand, there are advocates of "thick description", "deep appreciation" (Watt 2012) of mentalities, modes of thought in terms of reasoning style (*Denkstil*) who notice alterity only or remain genuine relativists. On the other, there are functionalists in the broad or minimalist sense, who detach their theoretical viewpoint from the participant's (practitioner's) perspective of a particular legal system or at least are willing to analyse law in teleological terms, and identify a social problem that various rules in systems A, B and C address differently and potentially also compare these solutions

in terms of a trans-systemic metric. In this latter opposition, Zweigert's theory can clearly be located on the second prong – without, however, having to give up much of its culturalist potential. But this probably indicates nothing more than that such a weak version of functionalism is hard to plausibly reject (Valcke – Grellette 2014, 106–11).

5. Conclusion

This paper discussed Zweigert's deceptively vague use of the term style in the classification of legal families as a case study on the uses of the term "style" in legal theorising. Zweigert's 1961 essay "Zur Lehre von den Rechtskreisen" was meant to provide a theoretical framework for classifying legal systems into legal families based on their style. He used style as a cluster concept grouping an eclectic mix of features characteristic for the history, language, techniques, doctrines and values of national laws. His explicit sources, including Goethe, Wölffin, Spiethoff and canon law, seem to have provided associative and superficial inspiration rather than a theoretical basis for this terminological move.

A possible way forward, in line with the letter of Zweigert's style doctrine but more ambitious than any of his theoretical writings, would be to engage in an aesthetic analysis of the style of legal systems. A stylistic analysis of law in this sense would go beyond Zweigert's primary concern, i.e. the taxonomic use of style. Yet it would not mean an exploration of law's connection to art (law in art, law as art) or an appreciation of its various manifestations in terms of beauty or ugliness.²⁰ To be sure, these may be legitimate enterprises on their own right. Rather, it may suggest an approach to law grounded in (philosophical) aesthetics. The purpose of an aesthetic analysis of law, as suggested e.g. by Schlag (2002) and Schürmann (2015), is to identify specificities and mannerisms of a legal system/tradition/family, for instance in how its officials establish facts or provide justifications for their decisions. These specificities are all the more interesting for academic study on their own right because they are not explicable in instrumental or functional terms (Dedek 2010, 70), nor are they systematically reflected upon by participants of that system/tradition/family.

Had Zweigert aimed at a thorough stylistic analysis of national legal cultures, he could have relied on theories grounded in *Geisteswissenschaften*, the philosophy and sociology of arts, culture, symbolic forms, as did, for instance, Triepel in his 1947 *Vom Stil des Rechts*. Such a commitment to a humanistic and cultural approach to comparative law, while not easily reconciled with the blunt functionalism expressed in some of Zweigert's programmatic methodological statements, seems compatible with the weak metaphorical sense of functionalism. For instance, Ralf Michaels hinted at such compatibility by arguing that legal cultures are the different ways to respond to similar functional challenges. "Properly understood, functional comparison does not, as is often claimed, fail to recognise or accept the identity of different legal systems. The focus on functional equivalence enables functional comparison to grasp simultaneously the similarities in the solutions and the differences in the ways of reaching these solutions. These differences in approaches can meaningfully be described as legal culture" (Michaels 2011, 5).

Looking back from 2019, Zweigert's style doctrine is rooted in but not entirely buried in the past. It can be explicated in light of (or even more generously, provide a starting point for)

²⁰ See e.g. Ching 2014.

current comparative research on legal styles as different characteristic modes of thought yet not falling prey to cultural relativism and postmodern nihilism (Peters – Schwenke 2000).

In such a moderately functionalist perspective, concerns about legal culture and function can be reconciled. To be sure, the dialectic gets more complicated if one questions the assumption that the functional problems law is supposed to solve can be both identified and analysed in culture-independent terms. Ultimately, perhaps, this boils down to the dualism of internal and external, first and third person perspectives raised by all cultural phenomena. But this is beyond the problem horizon of Zweigert's essay and thus the scope of this paper.

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